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RECENT CASES

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DIVORCE – Constructive Desertion. Appeal by the husband from a decree granting his wife a divorce on the ground of constructive desertion together with alimony, counsel fees, and awarding the wife custody of their two minor children. This was the second action by the wife to obtain a divorce *a vinculo matrimonii,* the earlier action, alleging physical cruelty, having failed for lack of proof to sustain the allegations. The present action was then commenced alleging that the plaintiff had been forced to leave the defendant because of his conduct and that such desertion had extended over a period of more than one year. The Master found that the plaintiff was entitled to a divorce *a vinculo matrimonii* upon the ground of constructive desertion for a period of one year. This finding was confirmed by the Juvenile-Domestic Relations Court, which in turn was confirmed by the Court of Common Pleas. On appeal, HELD: reversed in part. The portion of the decree granting to respondent a divorce *a vinculo matrimonii* is reversed, but in all other respects the decree appealed from is affirmed. In order to constitute constructive desertion, the conduct complained of must, in itself and independently, amount to one or more of the grounds for divorce permitted by the constitutional amendment. *Mincie v. Mincie,* S. C. Sup. Ct., Feb. 1, 1954.

While the doctrine of constructive desertion is generally recognized, there is an irreconcilable conflict in authorities as to the character of misconduct that must be shown to justify a divorce on this ground. Constructive desertion should never be permitted to be used as a subterfuge for obtaining a divorce on a ground not permitted by the Constitution. *Machado v. Machado,* 220 S. C. 90, 66 S.E. 2d 629 (1951). Conduct of wife, alleged by husband as ground for constructive desertion, did not constitute physical cruelty within the meaning of S. C. Divorce Statute. *Barstow v. Barstow,* 223 S. C. 136, 74 S. E. 2d 541 (1953). In action for a divorce *a vinculo matrimonii,* in order to establish constructive desertion, conduct of the offending spouse must be such as would support an action for a divorce *a mensa et thoro. Martin v. Martin,* 33 W. Va. 695, 11 S.E. 12 (1890). Cruel treatment justifying wife in leaving husband is same as cruel treatment affording ground for divorce. *Mullikin v. Mullikin,* 200 Ga. 638, 38 S.E. 2d 281 (1946). A divorce will not be granted except for legal cause prescribed by statute. *Alexander*

v. Alexander, 165 N. C. 45, 80 S.E. 890 (1914). The contrary view, that conduct need not be such as to independently support an action for divorce, is more widely accepted. *Machado v. Machado, supra;* Note A.L.R. 2d 1428, 1436 (1951); 4 S. C. L. Q. 318 (1951). Non-support, while not statutory ground for divorce, is sufficient cause for constructive desertion as ground for divorce. *Griffin v. Griffin,* 207 Miss. 500, 42 So. 2d 720 (1949); *Cooper v. Cooper,* 176 Md. 695, 4 A. 2d 714 (1939). If husband, by conduct or wrongful acts, compels wife to leave home, though wife's conduct may not be above reproach, he is the deserting party if his conduct is the more reprehensible. *Weatherspoon v. Weatherspoon,* 195 Or. 660, 246 P. 2d 581 (1952). In declaring the conduct necessary to constitute grounds for constructive desertion in England, Vaisey, J. said, ". . . the misconduct on which a case of desertion [constructive] would be founded would nowadays rarely if ever amount to a matrimonial offense, because such an offense, if it existed, would itself give the other spouse a right to relief and obviate the necessity for any application of the doctrine". *Buchler v. Buchler* (1947) Prob. 25, (1947) 1 All Eng. 319 - CA.

In the instant case the court has announced the type of conduct necessary to constitute constructive desertion as a ground for divorce in South Carolina. By declaring that only one or more of the grounds set forth in the constitutional amendment would justify a divorce on constructive desertion, the court has refused to admit actual constructive desertion as a fifth ground for the severance of matrimonial ties in this state. It has long been settled law that the complaining party may be awarded separate maintenance when the conduct of the offending spouse is such that cohabitation is rendered unsatisfactory, thus gaining only a moral victory in the courts. The parties to such a decree of special maintenance are denied the benefits of marriage while still burdened with the duties. In contemplation of law the parties are married, and may dissolve the order of the court by rejoining in marriage. Perhaps the court believes that by burdening both with the disadvantages, coupled with none of the advantages, the parties might forget their difficulties, reunite and preserve the home. It is undoubtedly laudatory for the court to follow a policy not to make divorces too easily available, however, in such as the instant case, where the parties twice sought relief from the contract of marriage, it is highly improbable that a reconciliation might be effected. It is suggested that substantial relief be allowed in cases as this in order to prevent the spreading practice of

such parties resorting to other jurisdictions for adequate solutions to their problems.

DEXTER R. HAMILTON.

TRADE REGULATION — Food, Drug and Cosmetic Act — Consumer Interest As Basis of Review. Petitioner sought judicial review and setting aside of an order by Federal Security Administrator allowing optional vitamin content of oleomargarine to be supplied by synthetic as well as natural sources without indicating the source on the label. Petitioner dealt in fish oil which was a natural source. He alleged he was "adversely affected" as both producer and consumer since he and members of his family as prospective consumers would be affected by the inclusion of the harmful ingredients. On motion by the Administrator to dismiss the petition for lack of jurisdiction, HELD: motion denied. Petition, however, was dismissed on its merits. Petitioner's allegations of interest as consumer did meet the jurisdictional requirements for securing judicial review as authorized by section 701 (f) (1) of the Federal Food, Drug and Cosmetic Act. *Reade v. Ewing,* 205 F. 2d 630 (2d Cir. 1953).

A party appealing from the order of the FDA relating to the labelling of food must be adversely affected by the order and there must be a case of actual, not merely colorable, controversy as to validity of the order. *Federal Food, Drug and Cosmetic Act,* S401, 701 (f) (1), 21 U.S.C. S341, 371 (f) (1); *U. S. Cane Sugar Refiners Assn. v. McNutt,* 138 F. 2d 116 (2d Cir. 1943); *Land O'Lakes Creameries, Inc. v. McNutt,* 132 F. 2d 633 (8th Cir. 1943); *A. E. Staley Co. v. Secretary of Agriculture,* 120 F. 2d 258 (7th Cir. 1941). The immediate concern of each petitioner is to show by allegation that he is "adversely affected" in order to avoid a dismissal for lack of jurisdiction under the statutory requirements. But, in order to come within the meaning of the statute, what economic capacity must the petitioner allege so that he could be considered a person "adversely affected" by the order? Previously, a supplier of an ingredient that had been excluded by an order of the FDA was held to be a person "adversely affected". *A. E. Staley Co. v. Secretary of Agriculture, supra.* Likewise, a butter producer was allowed to question the standard for oleomargarine. *Land O'Lakes Creameries, Inc. v. McNutt, supra.* Conversely, a marketer of a competitive produce was held not to be a person "adversely affected". *U. S. Cane Sugar Refiners Assn. v. McNutt, supra.* A producer of lecithin met with the same result

when he objected to the standard of identity fixed by an order of the FDA. *American Lecithin Co. v. McNutt,* 155 F. 2d 785 (2d Cir. 1946). In all of the above cases, the petitioners sought review on the basis of their economic standing as producers, suppliers, or manufacturers. Some were allowed standing to review while an equal number were dismissed. The scope and meaning of persons "adversely affected" as enunciated under section 701 (f) (1) of the Act, was not altogether clear. See: *Federal Food, Drug and Cosmetic Act,* 67 Harv. L. Rev. 632, 669 (1954). What was apparent, however, was that producers, suppliers, or persons in similar capacities could be met by a successful jurisdictional objection on the part of the government.

The petitioner in the instant case alleged his interest as producer and consumer, although the reviewing court only considered his consumer interest. An earlier case suggested that consumers would have the necessary interest to come within the statute. *Land O'Lakes Creameries, Inc. v. McNutt, supra.* That an individual, who himself had no interest whatever in the controversy other than that given by statute, may bring an action, is not new. *Marvin v. Trout,* 199 U. S. 212 (1905). *Qui tam* suits, as they are called, have been frequently permitted by legislative action. *U. S.* ex rel. *Marcus v. Hess,* 317 U. S. 537, 541 (1942); *Littleton v. Fritz,* 65 Iowa 488, 22 N.W. 641 (1885); *Barrows v. Farnums,* 254 Mass. 240, 150 N.E. 206 (1926). A striking example is the Federal Informers Act which authorizes private citizens to sue, in behalf of the government, other persons who obtained money from the government under fraudulent claims. See *U. S.* ex rel. *Marcus v. Hess, supra.* However, in other areas repeated attempts by private litigants to obtain a special stake in public rights have been consistently denied. *Massachusetts v. Mellon,* 262 U. S. 447 (1923); *Alabama Power Co. v. Ickes,* 302 U. S. 464 (1937); *Singer & Sons v. Union Pac. R. R. Co.,* 311 U. S. 295 (1940). But in *Scripps-Howard Radio v. Federal Communications Commission,* 316 U. S. 4 (1942), private litigants were allowed standing as representatives of public interest. The court has jurisdiction of appeals by a "person aggrieved" or by one "whose interests are adversely affected" by the Commissioner's decision. *F. C. C. v. Sanders Radio Station,* 309 U. S. 470 (1939). On the other hand, a person's affected interest must be such as to be unlawfully invaded by the order and not merely *danum absque injuria. Ala. Power Co. v. Greenwood,* 302 U. S. 485 (1937). Though Congress can confer on no one the right to bring an action in the absence of justifiable controversy, it may constitutionally authorize one such

as the Attorney General to bring a proceeding to prevent another official from acting in violation of his statutory powers, for then, there is an actual controversy. Instead of designating the Attorney General, Congress may constitutionally enact a statute conferring on any non-official person authority to bring a suit whose sole purpose is to vindicate the public interest. "Such persons, so authorized, are, so to speak, private Attorney Generals". *Associated Industries v. Ickes,* 134 F. 2d 694, 704 (2d Cir. 1943). Thus, private litigants gained the necessary interests to be persons "adversely affected". The way was made clear for private individuals in their economic capacity as consumers to seek judicial review of standards promulgated under order of the FDA.

The principal case appears to be the first in which the petitioner alleged his consumer interest to be "adversely affected". Previously, various restrictions had been imposed upon producers and competitors of producers. The line was apparently drawn in the *U. S. Cane Sugar Refiners' Assn. v. McNutt* decision, where, upon dismissing the petition, the court thought the alleged injury too speculative. The instant case represents an attempt to skirt these producer's restrictions, since the petitioner alleged his dual capacity of producer and consumer. This avenue would seem wide open; obviously, producers and there families are consumers or potential consumers, as is almost any other individual who may see fit to object to the standard. See: Christopher, *Significant Comments,* 8 Food, Drug, Cosmetic L. J. 600, 608 (1953). The only limitation laid down by the instant court was that the allegations not be "frivolous". But, as a practical matter, has the producer's position changed? More often than not, he, as a consumer, will be unable to lodge more than a "frivolous" objection as a matter of proof. Hence, if a producer wishes to take full advantage of his knowledge and resources, his status as producer must be alleged. The object of the instant case would appear to be primarily directed to the consumer's singular benefit. The court undoubtedly had the consumer in mind when it spoke of non-official litigants appearing as private "Attorney Generals" for the purpose of vindicating the public interest. There is no apparent objection and every justification in allowing the consumer his standing of review. After all, the fundamental purpose of the Act is his protection. The only cause for concern would appear to be the threat of endless lines of consumers cluttering the standard-setting procedure. Here again, a practical approach to the matter would be applicable. Just how many consumers would be sufficiently interested in seeking review of a standard label? Probably very few and even fewer would be

grievously affected by the inclusion of a harmful ingredient not listed on the label. If the latter group be sufficiently interested, then the new consumer standing would answer their need. Here is the real meaning behind the principal case. Certainly, the satisfied producer is not going to appeal a case nor is the FDA, who determined the standard where a harmful ingredient was included, perhaps inadvertently, in the standard. The consumer, here, fully qualifies as a person "adversely affected" and should be given every right to seek his standing on review. It is on this basis that the instant decision seems clearly sound.

WILLIAM C. DAVIS, JR.

CONSTITUTIONAL LAW: Power to Rezone. In 1920 plaintiff, American University, was classified " 'A' Residential" by defendant zoning commission. This district was to include private dwellings, apartment houses, hotels, hospitals, sanitariums, churches, and the like. Since that time, plaintiff has become surrounded by expensive residences and now desires to construct a hospital on the campus. This was emphatically opposed by property owners in that area because of possible impairment of property values, creation of traffic congestion, noise, and invasions of privacy. After a petition was filed with defendant, a hearing was held and an order issued rezoning the entire area to " 'A' Residential Restricted". If the order is to stand the hospital may not be built by plaintiff. On appeal from the zoning commission, the district court HELD: The rezoning was without relation to public safety, health, morals, or the general welfare and was a taking of property without due process of law. *American University v. Prentiss,* 113 F. Supp. 389 (D.C. 1953).

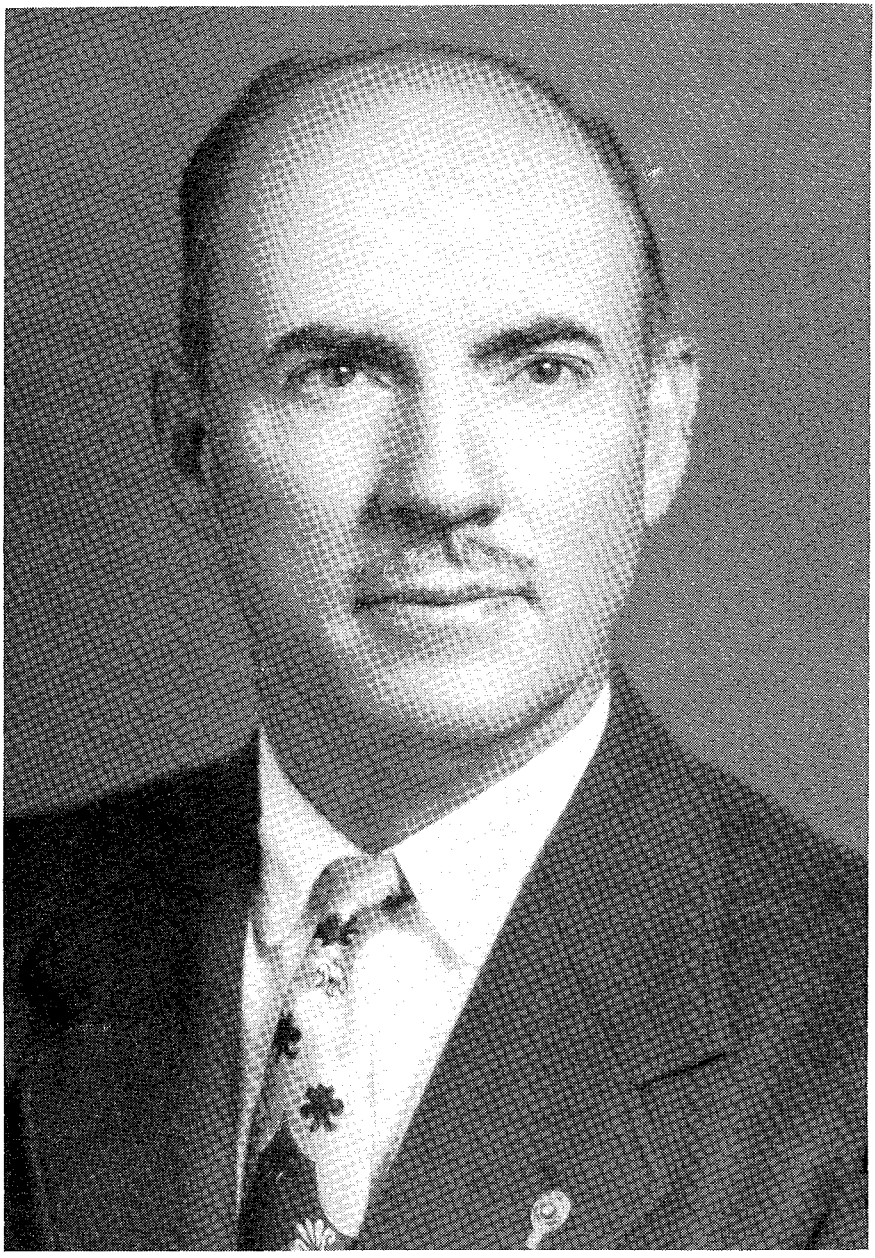
Generally speaking, zoning is constitutional if it bears a substantial relation to public safety, health, morals, or general welfare. *Village of Euclid v. Ambler Realty Co.,* 272 U. S. 365 (1926); *State of Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U. S. 116 (1928); *American Wood Products Co. v. Minneapolis,* 21 F. 2d 440 (D. Minn. 1927). Municipalities may adopt zoning ordinances as an exercise of their police power and thereby impose a reasonable restraint upon the use of private property, *Johnson v. Village of Villa Park,* 370 Ill. 272, 18 N.E. 2d 887 (1939), when they are fairly within the well-recognized bounds of such power. *People v. Scrafano,* 307 Mich. 655, 12 N.W. 2d 325 (1943). Moreover, in order that a zoning measure be valid, it is necessary that the public interest

in it reasonably outbalance individual personal and property rights opposed to it. *Wood v. District of Columbia,* 39 A. 2d 67 (D.C. Mun. 1944). A municipal corporation has no inherent police power and hence it has no inherent zoning power. Accordingly, municipal power must exist, if at all, by virtue of a delegation from the state. *Kass v. Hedgpeth,* 226 N.C. 405, 38 S. E. 2d 164 (1946). This delegation may be conferred by statutes, or by constitutional or charter provisions. Generally, it is conferred by zoning or enabling acts. *Julian v. Golden Rule Oil Co.,* 112 Kans. 671, 212 Pac. 884 (1923). Zoning ordinances are presumed to be valid and within the purview of police power in the absence of a showing that they are arbitrary or unreasonable. *Wilkins v. City of San Bernardino,* 29 Cal. 332, 175 P. 2d 542 (1946). If the question is fairly debatable, the zoning order must stand. *Levanthal v. District of Columbia,* 100 F. 2d 94 (D.C. Cir. 1938). The rules as to the limitations on the zoning power apply to an amendatory ordinance as well as to an original zoning ordinance. *Clifton Hills Realty Co. v. City of Cincinnati,* 60 Ohio App. 443, 21 N.E. 2d 993 (1938). Rezoning, as well as original zoning, is subject to the legislative discretion of the city council or other zoning authority, *Leventhal v. District of Columbia, supra,* and courts will not interfere therewith except for abuse clearly beyond dispute. *Rogers v. Village of Tarrytown,* 302 N.Y. 115, 96 N.E. 2d 731 (1951). While property owners have no vested rights by reason of the enactment of a zoning regulation so as to preclude a change in such regulation, *Page v. City of Portland,* 178 Or. 632, 165 P. 2d 280 (1946), they do have a right to rely on a rule of law that a classification made by a zoning ordinance will not be changed unless the change is required for the public good. *Debartolo v. Village of Oak Park,* 396 Ill. 404, 71 N.E. 2d 693 (1947). Indeed, it is fundamental that zoning ordinances must not infringe constitutional guarantees by invading personal or property rights unnecessarily or unreasonably. *Forde v. City of Miami Beach,* 146 Fla. 676, 1 So. 2d 642 (1941). In determining whether invasion of property rights under a purported police power, as by zoning, is reasonable, the character of the neighborhood, the use to which nearby property is put and the extent to which the property values are diminished by the provisos of the zoning ordinance must be considered. *Sinclair Refining Co. v. City of Chicago,* 178 F. 2d 214 (7th Cir. 1949). Each case must be determined on its own particular facts. *City of Pittsfield v. Oleksak,* 313 Mass. 553, 47 N.E. 2d 930 (1943). A zoning ordinance may be valid in its general aspects, yet invalid as applied to a particular piece of property and a particular set of

facts. *Anderman v. City of Chicago,* 379 Ill. 236, 40 N. E. 2d 51 (1942). Therefore, when the facts show zoning regulations bear no substantial relation to the public health, safety, morals, or general welfare, there is a taking of property without due process of law, and the regulations are unconstitutional and void. *City of Birmingham v. Monk,* 185 F. 2d 859 (5th Cir. 1951).

In the instant case, while applying these broad general principles, the court based its decision on the facts and surrounding circumstances. The foregoing decisions show that it was correct in so doing. Here the area rezoned included the entire university campus, a seventy-acre tract, when actually only a small eight-acre plot on the edge of the campus affected the adjoining landowners. No substantial evidence was brought out to show property values would be impaired. As to noise, it is commonly known that hospitals establish "quiet zones" for the welfare of the patients. Further, because of the particular location of the property here involved, the evidence showed that traffic in this area is heavy and any additional traffic, which would be a mere six or seven per cent increase due to the hospital, could be absorbed without difficulty. The trend in this area of the law is toward more restrictions in the use of urban property; however, it must be kept in mind that courts in deciding these problems try to balance the conflicting interests of the particular parties involved. A balancing of public interest as against private interests in property adversely affected is necessary to determine the reasonableness of zoning, its constitutionality and validity. Although governed by fundamental principles, discussed in the paragraph above, balancing must be present in each case and cannot be settled by any rule of law. Urban zoning in one area may be absolutely necessary and reasonable while the same zoning in another, where the circumstances are different, would be arbitrary and unreasonable. The facts in the case at hand seem to bring it under the latter situation.

EMORY B. BROCK.



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